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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 40270
Plaintiff-Respondent,)	
)	TWIN FALLS COUNTY NO. CR 2011-
)	14241
v.)	
)	
AARON WILLIAM FRANDSEN,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF TWIN FALLS

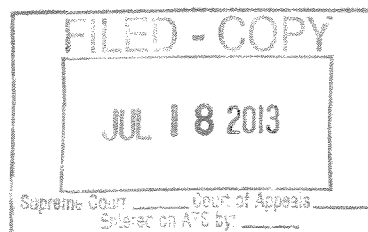
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STATEMENT OF THE CASE

Nature of the Case

Aaron William Frandsen appeals from a judgment of conviction for ten counts of lewd conduct with a minor under sixteen, entered after a jury trial. On appeal, Mr. Frandsen argues that the district court erred when it admitted, over Mr. Frandsen's objection, an irrelevant and highly prejudicial drawing depicting a nude female child with her legs spread, exposing her genitals. Mr. Frandsen also argues that his sentences are excessively harsh.

Statement of the Facts and Course of Proceedings

Mr. Frandsen was indicted on ten counts of lewd conduct with A.F. a child under the age of sixteen. (R., pp.9-15.) A plea bargain was not reached and the case went to a jury trial. During the jury trial, Dr. Reese testified as a medical expert for the State. (04/04/13 Tr., pp.169-209.) One of the topics on which Dr. Reese testified was a physical examination of A.F.'s genitals. (04/04/12 Tr., p.192-202.) Before Dr. Reese testified about her examination of A.F., the State moved for admission of Exhibit 1 a drawing, which is a representation of the position A.F. was in during the examination. (04/04/12 Tr., p.175, L.10 - p.176, L.8.) According to Dr. Reese, the picture depicts "a woman holding a child and the child is in what we would call a frog leg position with her genitalia open for viewing." (04/04/12 Tr., p.175, L.24 - p.176, L.1; Exhibit 1.) Mr. Frandsen objected to the admission of this exhibit as it was unduly prejudicial. (04/04/13 Tr., p.176, Ls.9-15, p.177- p.177, L.5.) The State made the following response to Mr. Frandsen's objection:

The doctor and I have discussed whether we put the actual pictures of [A.F.'s] body up on the huge screen for everyone to see, and it's her belief

that using a diagram instead would be less inflammatory for the jury as well as for the case. So that's the reason the state is asking to do it this way.

(04/04/12 Tr., p.176, Ls.18-24.) The district court then asked Mr. Frandsen if the objection to the exhibit was based on a theory that it was inflammatory. (04/04/12 Tr., p.176, L.25 - p.177, L.1.) Mr. Frandsen replied by saying that the exhibit was also not necessary for the jury to determine either his guilt or innocence. (04/04/12 Tr., p.177, Ls.2-5.) The district court clarified that the exhibit was a diagram from a medical book and not an actual picture of A.F. and admitted the picture into evidence.¹ (04/04/12 Tr., p.177, Ls.6-13.)

The jury returned a guilty verdict on all ten counts. (R., pp.196-198.) Mr. Frandsen received ten concurrent unified life sentences, each with twenty five years fixed. (R., pp.247-254.) Mr. Frandsen timely appealed. (R., pp.256-259.)

¹ The exhibits admitted at trial are currently not in the record. Accordingly, a motion to augment has been filed concurrently with this brief.

ISSUES

1. Did the district court err when it admitted irrelevant and highly prejudicial evidence over Mr. Frandsen's objection?
2. Did the district court abuse its discretion when it imposed upon Mr. Frandsen ten concurrent unified life sentences, each with twenty five years fixed, following his conviction for ten counts of lewd conduct of a minor under the age of sixteen?

ARGUMENT

I.

The District Court Erred When It Admitted Irrelevant And Highly Prejudicial Evidence Over Mr. Frandsen's Objection

A. Standard Of Review

Separate standards of review apply to issues of admissibility of evidence under Idaho Rules of Evidence 401 and 403. *State v. Waddle*, 125 Idaho 526, 528 (Ct. App. 1994). Idaho appellate courts freely review questions of relevancy under I.R.E. 401 because relevancy is a question of law. *Id.* On the question of whether the evidence's probative value is substantially outweighed by its unfairly prejudicial impact under I.R.E. 403, however, Idaho appellate courts will review the trial court's decision for an abuse of discretion. *Id.* Where a matter is committed to the discretion of the trial court, an appellate court will conduct a three-tiered inquiry on appeal. Those three inquiries are whether: (1) the lower court rightly perceived the issue as one of discretion; (2) whether the court acted within the boundaries of such discretion and consistently with any legal standards applicable to specific choices; and (3) whether the court reached its decision by an exercise of reason. *Id.*

B. The District Court Erred When It Admitted Irrelevant And Highly Prejudicial Evidence Over Mr. Frandsen's Objection

1. State's Exhibit 1, A Diagram Of A Nude Female Child With Her Legs Spread, Exposing Her Genitals, Was Not Probative Of Any Material Fact In Mr. Frandsen's Trial

Mr. Frandsen objected to the admission of State's Exhibit 1 on the basis that it was not necessary for the jury or, in other words, it was not relevant. (04/04/12 Tr., p.177, Ls.2-5.) Evidence is relevant if "it has any tendency to make the existence of

any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” I.R.E. 401. As stated above, the exhibit at issue was a drawing of a nude female child in the arms of an adult with her legs spread, exposing her genitalia. (State’s Ex. 1.)

The drawing of a nude girl is not relevant to any of the elements of lewd conduct. Mr. Frandsen does not contest that the evidence obtained during the examination of A.F., the fact her hymen was broken, is relevant to this case. (R., pp.9-15.) However, a drawing of the position A.F. was in during the examination of her hymen does not help the jury determine whether her vagina was penetrated. It does not matter how Dr. Reese conducted her examination of A.F. The State did not argue that Dr. Reese’s examining of A.F. was more reliable because the examination occurred in the “frog position.”

While not directly dealing with I.R.E. 401, the Idaho Court of Appeals has provided some guidance as to this issue. In *State v. Troutman*, 148 Idaho 904 (Ct. App. 2010), a prosecutor brought up an alleged rape victim’s medical examination. *Id.* at 910. The prosecutor specifically stated that “She is going through the rape kit and the rape exam and suffering for five hours of that on her own without really knowing what all is going on and not having an answer to anything.” *Id.* The Idaho Court of Appeals found that the foregoing facts referenced by the prosecutor were irrelevant to the defendant’s innocence or guilt. *Id.*

In this case, the only relevant issue discussed by Dr. Reese was whether A.F.’s hymen was ruptured. The position A.F. was in during Dr. Reese’s examination of A.F. did not help the jury to determine whether A.F.’s hymen was ruptured. The only

purpose for this exhibit was to let the jury know that A.F. sat naked in the arms of an adult with her legs spread open, exposing her genitals to a stranger, Dr. Reese.

2. The Probative Value Of State's Exhibit 1, If Any, Is Substantially Outweighed By Its Prejudicial Effect

In the event this Court determines that State's Exhibit 1 has some probative value, Mr. Frandsen argues that its probative value is substantially outweighed by its prejudicial affect. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" I.R.E. 403. Mr. Frandsen objected to the introduction of State's Exhibit 1 on the grounds that it was inflammatory. (04/04/12 Tr., p.176, Ls.10-15.) In response, the State argued that it was contemplating introducing actual pictures of A.F. during the medical exam into the record, but it decided to use the diagram because it would be "less inflammatory for the jury" (04/04/12 Tr., p.176, Ls.18-24 (emphasis added).) By the State's own admission, Exhibit 1 is inflammatory.

State's Exhibit 1 has no probative value. As argued in Section I(B)(1), *supra*, the nude diagram of a child in the "frog position" has no relevance, as there was no issue in this case questioning the procedures Dr. Reese employed to examine A.F.'s hymen. The arguments made in Section I(b)(1) are incorporated herein by reference thereto.

While the diagram has no, or virtually no, probative value, it is highly prejudicial. As stated above, the State admitted that it was inflammatory. (04/04/12 Tr., p.176, Ls.18-24.) The only purpose of State's Exhibit 1 was to direct the jury's attention to the fact that A.F. had to get naked in front of a stranger and let that stranger probe her genitalia. The mental image this exhibit would have conjured in the jury's mind shifted the jury's focus from the relevant evidence at hand and forced the jury to envision A.F.

in a compromised position. The only purpose for such a tactic was to create sympathy for A.F. as the jury would emotionally connect with the vulnerability of A.F. in such a position.

The diagram is also inflammatory because it depicts a child, in a lewd conduct trial, sitting naked on the lap of an adult. Even though Dr. Reese asserted that the adult depicted in the drawing is female (04/04/12 Tr., p.175, L.21 - p.176, L.1), the adult is rather androgynous in appearance and could easily be considered male. (State's Ex. 1.) The adult is actually holding the child's legs open. (State's Ex. 1.) The child appears to be upset. (State's Ex. 1.) Again, in the context of a lewd conduct trial, this exhibit only focused the jury on the fact that A.F. got naked in front of multiple adults, while one adult held her legs open while the other adult examined her genitalia.

Dr. Reese's testimony immediately after the exhibit was introduced exacerbated the inflammatory effect of the exhibit. Specifically, Dr. Reese described the position the child in the diagram was in and pointed out that this "frog position" is not used with adults and only used with younger children. (04/04/12 Tr., p.178 L.20 - p.179, L.1.) This testimony only emphasized the vulnerability of children, but did not have any bearing on the issue of whether A.F.'s hymen was ruptured and, if so, whether MR. Frandsen could be responsible for the rupture. Guidance as to the prejudicial effect of such testimony can be found in *Troutman, supra*, where after finding that the prosecutor's references to an alleged rape victim's medical exam as irrelevant, the Court of Appeals went on to hold that those comments "had the effect of evoking sympathy for H.S. and encouraging the jury, at the outset of trial, to identify with the victim's suffering and therefore, was improper." *Troutman*, 148 Idaho at 910. In this case, not only did the verbal description of A.F.'s medical examination evoke sympathy

for A.F., but the jury also viewing a picture of a child's genitalia while this testimony was elicited.

In sum, the State's exhibit, which is just creepy, has no probative value and was highly prejudicial as it would get the jury to think about A.F. in a compromised situation while Dr. Reese performed her examination. The prejudicial effect of this picture was exacerbated because Dr. Reese emphasized that the "frog position" was only used when children are examined, emphasizing A.F.'s tender age.

II.

The District Court Abused Its Discretion When It Imposed Upon Mr. Frandsen Ten Concurrent Unified Life Sentences, Each With Twenty Five Years Fixed, Following His Conviction For Ten Counts Of Lewd And Lascivious Conduct With A minor Under Sixteen Years Of Age

Mr. Frandsen asserts that, given any view of the facts, his ten concurrent unified life sentences, each with twenty five years fixed, are excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. See *State v. Reinke*, 103 Idaho 771 (Ct. App. 1982).

The Idaho Supreme Court has held that, "[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence." *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). Mr. Frandsen does not allege that his sentence exceeds the statutory maximum. Accordingly, in order to show an abuse of discretion, Mr. Frandsen must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* The governing criteria or

objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

Mr. Frandsen had a turbulent childhood. His parents divorced and he moved so many times he could not remember the actual number during the presentence investigation. (Presentence Investigation Report (*hereinafter*, PSI), p.111.)² Mr. Frandsen's father characterized the divorce as "extremely hostile" and indicated that it negatively impacted Mr. Frandsen. (PSI, p.205.) When his sister was twelve years old she accused their father of sexual abuse. (PSI, p.111.) However, their father was eventually acquitted. (PSI, p.111.) At one point in time, the Department of Health and Welfare removed Mr. Frandsen and his siblings from their mother's home and placed them into foster care. (PSI, p.111.) Mr. Frandsen's first foster parent developed lung cancer and died. (PSI, pp.111-112.)

Mr. Frandsen received treatment from the Department of Health and Welfare in the past, which was associated with sexual offenses he committed as a child. (PSI, p.205.) However, his father stated that the treatment he received failed him. (PSI, p.205.) Defense counsel also pointed out that the treatment occurred approximately twenty years before the instant offense and that is a significant gap between incidents of criminal behavior. (08/10/12 Tr., p.270, L.20 - p.272, L.4.)

Despite these setbacks, Mr. Frandsen earned his GED and his high school equivalency at the College of Southern Idaho. (PSI, p.114.) Mr. Frandsen enrolled in the military in 2001 and was honorably discharged in 2009. (PSI, p.114.) Mr. Frandsen

² Citations to the PSI will adhere to the pagination contained in the electronic exhibit file. As a further note, the PSI follows the transcript of the grand jury proceedings, beginning on page 104 of the electronic exhibit file.

is an Iraq war veteran. (PSI, p.115.) In addition to his military service, Mr. Frandsen has maintained steady employment. (PSI, p.115.) Mr. Frandsen was employed at the time of his arrest for the instant offense. (PSI, pp.115-116.) Additionally, Mr. Frandsen does have some family support. (PSI, p.118.)

Mr. Frandsen's antisocial personality disorder diagnosis is suspect. At sentencing, the State addressed Mr. Frandsen's antisocial personality disorder in aggravation. (08/10/12 Tr., p.260, L.22 - p.262, L.10.) Defense counsel disagreed:

[W]hen we go before a mental health evaluator, I think often because a person has a criminal record they have indicated already that they haven't abided by the norm of society. So when he goes in front of a mental health evaluator who has mental health training and has been convicted of these counts without coming forward and pleading guilty to them, I think that's a diagnosis that's almost a knee-jerk reaction.

As confirmation of that, I would refer the court to the mental health evaluation reported by Ron Jones who actually worked with [Mr. Frandsen] for a time at Positive Connections. The diagnosis there . . . [was not antisocial personality disorder] but rather, talked about mood disorder, generalized anxiety disorder and major depressive disorder I would hesitate to have the court rely on that diagnosis when we have another evaluation done by a competent evaluator who actually worked with [Mr. Frandsen] and there was no indication of antisocial personality disorder at that point in time.

(08/10/12 Tr., p.265, L.10 - p.266, L.7; PSI, p.116.)

In sum, there are mitigating factors which support the conclusion that the district court abused its discretion by imposing an unduly harsh sentence.

CONCLUSION

Mr. Frandsen requests that his judgment of conviction be vacated and that this case be remanded for a new trial. Alternatively, Mr. Frandsen respectfully requests that the fixed portion of his sentence be reduced.

DATED this 18th day of July, 2013.



SHAWN F. WILKERSON

Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

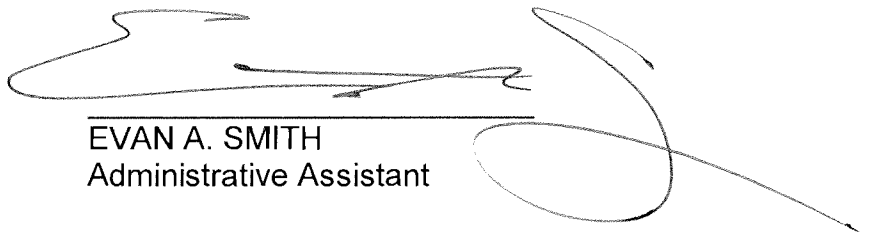
I HEREBY CERTIFY that on this 18th day of July, 2013, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

AARON WILLIAM FRANDSEN
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